Supreme Court, U.S.
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No. 99-1376

IN THE

Supreme Court of the United States

FRANK JOSEPH SEDDIO,

Petitioner,

v.

LYN MICHAELS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

JILL ELIZABETH TATE O'CONNELL
Counsel of Record
PATRICK A. WRIGHT
MORRIS & MORRIS, L.L.P.
Attorneys for Respondent
900 Parker Square, Suite 235
Flower Mound, Texas 75028
(972) 539-0090

158450

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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Respondent, Lyn Michaels respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Frank Joseph Seddio, Jr. seeking review of the judgment and opinion of the Court of Appeals, Second District of Texas, Fort Worth.

STATEMENT OF THE CASE

Petitioner's Statement of the Case has misstated the facts of the case. Frank and Lyn were divorced by an agreed decree of divorce on February 19, 1991. However, Petitioner has misstated and omitted several pertinent facts. The decree that was entered in this matter was not a simple divorce decree and its title reflects that. The decree was entitled as follows: "Agreed Final Judgment and Decree of Divorce and Binding Contractual Property Settlement Agreement of the Parties" (hereinafter "Agreement") to reflect the contractual nature of the agreement.

Furthermore, these parties went on to recite in detail that the Agreement was a voluntary, mutual and clearly understood contractual agreement, that each had independent legal counsel and opportunity to seek advice from independent legal counsel, that each was completely informed of the facts, had carefully, intelligently, and completely read each and every provision of the Agreement, had given careful, mature and informed thought and consideration to making the Agreement, and completely and fully understood, "for all purposes, each and every provision" of the Agreement, "both as to the subject matter therein contained and the binding legal effect of all Agreements and Orders.". Pet. App. at 24a-25a.

Additionally, Petitioner states that at the time of the divorce, Frank was retired as a master sergeant with 20 years of experience. However, Petitioner fails to mention that at the time of the divorce through the time of the hearing in the trial court on the Motion to Enforce, Frank was employed at Electronic Data Systems (EDS), Plano, Texas. Pet. at 2a, (CR 3), (RR 32).

Furthermore, the divorce decree does not contain a "QUARDO" (sic). It appears that Petitioner is referring to a Qualified Domestic Relations Order by the use of those initials. A Qualified Domestic Relations Order is a separate order entered to effectuate the division of either a defined benefit or defined contribution account in a private plan. Military retirement is not divided or paid by the Secretary of Defense by the use of a Qualified Domestic Relations Order.

REASONS FOR DENYING THE WRIT

The Petitioner presents two questions for review. The first question is whether the state courts have authority under 10 U.S.C. § 1408 to enforce an agreed divorce decree which awards a specific sum of money based in part upon retired pay that the retiree subsequently waives to receive veterans disability benefits. The second question presented asks if a state court has authority under the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, as interpreted in ***Mansell v. Mansell***, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), to enforce an agreed divorce decree provision which awards the former spouse a sum that is based in part upon the amount the retiree waived if the divorce decree contains a general indemnification against undisclosed debts or obligations if a military retiree

waives his retired pay to receive a VA disability benefit after a divorce. Neither of these questions is raised by the claim made by Petitioner to the Court of Appeals.

Petitioner claims that the federal question sought to be reviewed was raised by claiming that the divorce decree was void to the extent that it calculated the amount of military pay due to Lyn without regard to Franks disposable retired pay. The claim made by Petitioner was simply that the decree was void. Neither the Court of Appeals' holding nor the record below raised these questions. Neither of these questions accurately presents the issues analyzed and ruled upon in the court of appeals. The Court of Appeals has not decided an important federal question in conflict with relevant decisions of this Court. The Court of Appeals did not ignore the USFSPA, as interpreted in ***Mansell*** in its ruling and analysis. Service Members on active duty are not affected by the analysis of the Court of Appeals. There is no state court trend, and if there were, it would not be affected in any way by this case. This case is a fact specific state court case about enforcing a decree of divorce as a binding contractual property settlement agreement. The Court of Appeals', Second District of Texas, Fort Worth, analysis and ruling was correct and Respondent asks this Honorable Court to deny the petition.

I.

NEITHER THE RECORD OR THE DECISION BELOW RAISED THE QUESTIONS PRESENTED FOR REVIEW

Petitioner claims that the questions presented for review were raised in the trial court and the Court of Appeals by

Petitioner's claim that the divorce decree was void to the extent that it calculated the amount of military pay due to Lyn without regard to Frank's disposable retired pay. The only claim made by Petitioner in the lower court was simply that the decree was void.

The case below focused on Petitioner's claimed points of errors in the appeal to the Court of Appeals. The only substantive point of error argued by Petitioner and considered by the Court of Appeals was whether or not the portion of the agreement that purportedly awarded Lyn fifty percent of all Frank's retirement benefits was void. This part of the agreement purportedly attempted to award Lyn one-half of his VA disability pay. There is no evidence in the record below regarding the question of whether or not state courts have authority under the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, to enforce an agreed decree of divorce wherein one spouse agrees to pay a former spouse a sum certain which amount is figured upon that amount of gross retired pay that the military retiree is entitled to receive. Nor is there any evidence in the record regarding the question of a state court having authority under the Uniformed Services Former Spouses Protection Act to enforce an agreed decree of divorce wherein one spouse agrees to pay a former spouse a sum certain, based upon the amount that the military retiree is entitled to receive, if the military retiree waives his retired pay to receive a VA disability after a divorce.

Petitioner posed four points of error to the Court of Appeals. The first point of error was the argument that the agreement was void. The second point was overruled because it had not been preserved as error in the trial court. The third and fourth points went to an award of attorney's fees and

were overruled based on the disposition of the first point of error.

In the "Discussion" section of its opinion the Court of Appeals states that in the first point of error,

> Frank argues the portion of the agreement that purportedly awards Lyn fifty percent of all his retirement benefits is void because it attempts to award Lyn one-half of his VA disability pay in violation of the Former Spouses' Protection Act (the Act) and the United States Supreme Court's interpretation of the Act in ***Mansell v. Mansell***, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

Pet. App. at 40a.

Petitioner has not included a cite to a location in the record that the questions now sought to be reviewed were raised in the trial court or the Court of Appeals except to the place in the clerk's record wherein Petitioner made his "void" argument. Nor has Petitioner included a cite where the raised questions were addressed by either the trial court or within the opinion by the Court of Appeals. The only reason for the lack of citation is because these questions were neither raised nor addressed in either the trial court or the Court of Appeals. The Court of Appeals correctly decided this case.

II.

THE COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH A RELEVANT DECISION OF THIS COURT

McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981) held that a spouse of a former service person did not have the right to be awarded any interest in the service member's retired pay. This case was effectively overruled by 10 U.S.C. § 1408 — Uniformed Services Former Spouses' Protection Act (USFSPA). This act provided the state courts the way to determine what interest the community has in a retired service member's retirement pay, created the definition of disposable retired pay and gave the states the power to treat disposable retired pay as community property while ordering a division of property in a divorce case.

In ***Mansell v. Mansell***, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), which followed Congress' enactment of the USFSPA, this Court decided the issue of whether the state court can divide and award a portion of retirement pay waived to receive veterans' disability benefits, as part of a division of property in a divorce action. The parties in ***Mansell*** agreed to divide Major Mansell's total retirement pay including that portion of the retirement pay waived so that disability pay could be received. This Court held that the USFSPA does not grant a state trial court the power to treat the actual military retirement pay which has been waived to receive VA disability benefits, as divisible property. This Court's language was very precise and limited. Thus, this Court only decided the issue of whether a state could treat, and thus divide, retirement pay waived to receive

VA disability benefits as marital property. The issue of whether or not a state court could enforce an agreement that referenced the retirement pay amount was not addressed in ***Mansell***.

The ***Mansell*** case is distinguished from this case and thus the Court of Appeals' decision does not conflict with it. In this case, in the decree of divorce entitled "Agreed Final Judgment and Decree of Divorce and Binding Contractual Property Settlement Agreement of the Parties" Petitioner agreed to pay Respondent a certain sum of money as follows:

> a monthly amount of money equal to fifty (50%) per cent of that monthly amount that a retired Master Sergeant, with twenty (20) years' (sic) of service will receive on the date FRANK JOSEPH SEDDIO, JR. shall become entitled for the period beginning on the date of retirement and ending on the death of FRANK JOSEPH SEDDIO, JR.

Pet. App. at 8a.

This language is not the standard language required to divide military retirement pay nor is it a mistaken attempt to divide Frank's disability pay. The parties contemplated their agreement prior to entering into it and went on to provide within the Agreement a section entitled "Contractual Agreements Voluntary, Mutual and Clearly Understood" the following stipulations:

> Petitioner, LYN LARAINE (OTT) SEDDIO, and Respondent, FRANK JOSEPH SEDDIO, JR. each, has been and is, completely informed of the facts relating to the subject matter of these several binding contractual Agreements, herein

contained, and of the rights and liabilities of both Parties;

Each Party, Petitioner, LYN LARAINE (OTT) SEDDIO, and Respondent, FRANK JOSEPH SEDDIO, JR., enters into this Agreement(s) voluntarily and only after receiving the advice of independent Legal Counsel, or having been provided with the opportunity to seek independent advice from independent Legal Counsel;

Each Party, Petitioner, LYN LARAINE (OTT) SEDDIO, and Respondent, FRANK JOSEPH SEDDIO, JR., has given careful, mature and informed thought and consideration to the making of this Agreement(s);

Each Party, Petitioner, LYN LARAINE (OTT) SEDDIO, and Respondent, FRANK JOSEPH SEDDIO, JR., has carefully, intelligently and completely read each and every provision of this Agreement(s), and this "Agreed Final Decree of Divorce and Binding Contractual Property Settlement Agreement", and all of its provisions, herein contained; and;

Each Party, Petitioner, LYN LARAINE (OTT) SEDDIO, and Respondent, FRANK JOSEPH SEDDIO, JR., completely and fully understands, for all purposes, each and every provision of this Agreement(s), both as to the subject matter therein contained and the binding legal effect of all Agreements and Orders herein contained.

Pet. App. at 24a-25a.

Petitioner and Respondent entered into a contractually binding settlement agreement and simply used the amount of military retirement as a benchmark. Additionally, Petitioner was employed full time at Electronic Data Systems, Dallas, Texas at the time of the divorce. Pet. App. at 2a, (CR 3), (RR 32). The parties knew that Petitioner had other resources from which to pay Respondent the amount to which they agreed. ***Mansell*** does not prohibit Petitioner from entering into the Agreement and using the amount that he is entitled to as the means to determine what he would pay Respondent. Petitioner did not have to pay Respondent from the money he received as a result of his waiver. The decision to waive a portion of his disposable retired pay was Petitioner's unilateral decision. The Court of Appeals correctly found as follows:

> The Mansells' agreement expressly divided Gerald's VA disability benefits in contravention of the Act, Frank and Lyn merely contracted to divide a definite amount, irrespective of ancillary or subsequent occurrences such as we have here.

Pet. App. at 42a.

Petitioner ignores the plain factual differences and claims that the Court of Appeals' distinction is a distinction without a real difference in an attempt to transform this case into one that conflicts with ***Mansell***. In order for there to be no difference between the cases, Petitioner would have had to agree to "divide" his "total retirement" with Respondent and not have another assets or means to pay, and not be employed full-time at the time of the divorce or subsequent court action. However, those are not the facts of this case. The Court of Appeals' decision was based on its analysis of facts, and its

application of the ***Mansell*** holding to the facts in this case. This Court's Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Petitioners would like this Court to ignore the clear language of the Court of Appeals' holding as well as Rule 10 in order to have the Writ granted.

Petitioner continues on to create another interpretation of the Court of Appeals' holding which has no basis in the opinion of the Court of Appeals. This "interpretation" and the claims by Petitioner are without a cite to the opinion because it is entirely of Petitioner's creation and thus without a reference to this case or the Court of Appeals. Therefore, this "interpretation" is an illusion, without merit and has no bearing on the consideration of the writ. Pet. 8-9.

The Court of Appeals correctly held that in addition to the foregoing distinctions, based on the particular indemnification clause that was contained with the Agreement that reimbursement, or satisfaction, upon the entry of a judgment against one of the parties arising from the agreement was ensured. Additionally, the indemnification clause does not include a specific source for the amounts due.

The Court of Appeals' decision is a fact specific state law decision, which is not in conflict with decisions of this Court.

III.

THERE IS NO STATE COURT TREND, AND IF THERE WERE, IT WOULD NOT BE AFFECTED IN ANY WAY BY THIS CASE

Petitioner claims that there is a trend of state courts evading the specific language of the USFSPA and the teaching of this Court in ***Mansell***. This claim is totally without foundation. The truth is that the language in the USFSPA is very specific and very limited. This Court in ***Mansell*** held that domestic relation matters are preeminently matters of state law and that Congress rarely intends to displace state authority in this area. ***Mansell***, 490 U.S. at 587, 109 S. Ct. at 2028, quoting ***Hisquierdo v. Hisquierdo***, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979). This Court went on to state that it has held that it will not find preemption absent evidence that it is "positively required by direct enactment." In fact in ***Mansell***, this Court held that the language of § 1408(c)(1) is both plain and precise. The USFSPA gives the state courts the power to treat "disposable retired or retainer pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." § 1408(c)(1). The state courts still have the authority to use the laws of their jurisdiction in the area of domestic relations.

Additionally, within Petitioner's claims he misquotes several things. Petitioner begins the argument by stating that many state courts have "ignored the statutory limitations in the USFSPA and interpreted it to return to the states total authority to divide military retired pay, as in the pre-***McCarty*** era". Pet. at 10. The cite is Gilbert, *A Family Law Practitioner's Road Map to the Uniformed Services Former*

Spouses' Protection Act, 32 Santa Clara L. Rev. 61, 74, 75. (1992). What the article actually states is as follows:

> **Until recently**, many states ignored the statutory mandate that disability pay, which is difficult to obtain, cannot be considered as part of the disposable military retired pay over which state courts hold jurisdiction. . . . The game changed when the United States Supreme Court held in ***Mansell v. Mansell*** that federal law means what it says. In ***Mansell***, the Court noted that the language of the USFSPA is "both precise and limited." The Court held that state courts only have the authority to treat disposable retired pay, as defined by federal law, as material property. **Since receiving the clear message of *Mansell*, courts appear to have complied with the proscription of the USFSPA**.

(Emphasis added).

Petitioner goes on to cite Fenton, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, 1998-FEB Army Law. 31 (1988), as holding the position that many state courts are undeterred in their efforts to thwart any limitations upon their power to divide gross retirement pay. This is simply not a statement contained within the article cited. The article is a brief discussion of ***Abernethy v. Fishkin***, 699 So. 2d 235 (Fla. 1997) and ***In re Marriage of Gaddis***, 191 Ariz. 467, 957 P. 2d 1010 (Ariz. App. 1997), and concludes by stating that the issues concerning the USFSPA remain very state specific. 1998-FEB Army Law. 31, at 33.

Petitioner continues on and begins to recite numerous cases decided in many states. Petitioner begins this recitation with the mention of ***In re Krempin***, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (1999). In fact, Petitioner utilizes quite a bit of the dicta contained within ***In re Krempin***, as the majority of his discussion of the various state court holdings within his petition. Petitioner also cites ***In re Krempin***, for the holding that "if the military retiree waives retired pay to receive disability benefits, the state courts have the equitable power to impose a resulting trust on the money received as disability payments." Pet. at 12. However, this is not a holding of the ***In re Krempin*** court. This language actually comes out of the portion of the ***Krempin*** opinion that is discussing another California case and a commentary written about that case. The ***Krempin*** court discussed a resulting trust but limited it to a narrow set of facts and remanded the case to the trial court to determine if those facts exist.

All of the remaining state court decisions that are cited by Petitioner do in fact take different approaches to the property issues that they are answering. However, that is well within the scope of the authority that is expressly given to them within the USFSPA. Thankfully, divorces are not federal matters. States differ in terms of property ownership theories — equitable, community — as well as inception of title theories. These are not matters that are defined by federal law or ***Mansell.*** In each of the state court cases, the parties' property was divided based upon the individual circumstances and the application of state law. In each of the cases, subsequent to the division of property, one party unilaterally modified the court's order. The state courts are the proper courts to decide these domestic relation matters.

State courts are well within their authority to consider all of the circumstances of the property of the marriage, and divide the property under their jurisdiction's authority and laws pursuant to the USFSPA. This is not a matter for Congress, as Petitioner claims. The state court decisions are simply a reflection of the individual jurisdictions' state laws. Additionally, this decision is not a published opinion and therefore cannot be used as precedent. This Court of Appeals decision will not affect anyone but the parties involved.

IV.

SERVICE MEMBERS ON ACTIVE DUTY ARE NOT AFFECTED BY THE ANALYSIS OF THE COURT OF APPEALS

The analysis and ruling by the Court of Appeals in this case will not in any way affect active duty, military personnel. First, this opinion of the Court of Appeals is not a published opinion. Therefore, the ruling in this case by the appellate court cannot be used, as precedent by any party at any time. Second, the facts in this case and the language in the divorce decree is unique, and thus distinguishable from ***Mansell*** and the analysis by the Court of Appeals recognized that and ruled accordingly.

Additionally, Petitioner simply claims that the "crux" of the opinion of the Court of Appeals and the "other courts" is that on those subsections (a)(4) exclusions that actually exist on the date of the divorce decree are excluded from the state court's division of property upon divorce and that therefore, a member who is divorced while on active duty will be denied the application of subsections

(a) (4)(B) & (C). Pet. at 13. This statement is not supported by any type of reasoning or argument by Petitioner. This is blatantly wrong. The Texas Court of Appeals ruling does not interpret or limit any subsections of the USFSPA. The ruling does not discuss USFSPA sections specifically at all. The Texas Court of Appeals ruling will not affect active service members.

Furthermore, the holdings from the "other courts" do not hold that an active service member will be denied the application of any portion of the USFSPA. The state courts have the authority to render a division of property based on state law by the authority expressly given to them.

To put it simply this argument is either based on the most egregious misunderstanding of the cases, domestic relations' law and the division of military retirement or is simply a huge exaggeration to persuade this Court to grant the petition. The case law cited by Petitioner in no way holds that active military personnel will be denied the application of any subsections of the USFSPA.

V.

THERE IS NO NEED FOR REVIEW BY THIS COURT

As previously discussed at length, the state courts are not disregarding this Court's holding in ***Mansell***. Petitioner also claims that within the articles that he has cited the authors suggest that it would be malpractice for lawyers representing former spouses not to assert these various approaches to evade ***Mansell*** is also without merit. The area of domestic relations' law is very intricate and requires research and education to maintain a working knowledge of

all of the potential pitfalls. The article that Petitioner cites by Sullivan, *Military Pension Division: Crossing the Minefield* 31 Fam.L.Q. 19 (1997), is an article that actually discusses how difficult it is to correctly prepare and negotiate a divorce involving military issues and that a mistake can be easily made. If there is a suggestion concerning malpractice, it is that practitioners need to either research military issues in a divorce or not take the case because a mistake in this area can be easily made. The article does not assert the position that Petitioner claims. Additionally, the article by Block, *Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce?* 1995-OCT Army Law 28 (1995), is an article that discusses possible ramifications of the definition of "disposable retired pay" and potential solutions. The articles do not take the position that Petitioner claims.

While there may be various methods that the states have used to divide property in a divorce, this Court has specifically held in both ***Mansell*** and ***Hisquierdo*** in the area of domestic relations law the state courts retain that authority. There is not a trend of state courts evading this Court's teaching or holdings. There is no need for this Court to take up this case.

CONCLUSION

Petitioners have failed to provide a compelling reason for this Court to grant a Writ of Certiorari. The questions sought to be reviewed were not raised in the trial court or the Court of Appeals. The Court of Appeals correctly analyzed the facts in this case. The Court of Appeals has not decided an important federal question in a way that conflicts with relevant decisions of this Court. This case is a fact specific case that will not affect or concern anyone but the parties. The Court of Appeals was correct in its decision. This case does not merit further review.

Respectfully submitted,

JILL ELIZABETH TATE O'CONNELL
Counsel of Record
PATRICK A. WRIGHT
MORRIS & MORRIS, L.L.P.
Attorneys for Respondent
900 Parker Square, Suite 235
Flower Mound, Texas 75028
(972) 539-0090